2010

# State of Utah, by and through, Layton city, a municipal corporation v. Sherri Lee Tatton : Brief of Appellee

Utah Court of Appeals


Jeremy M. Delicino; Attorney for Appellant.
Clinton R. Drake; Layton City Attorney\'s Office; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH, by and through, | : | |
| LAYTON CITY, a municipal corporation | : | |
| Plaintiff and Appellee, | : | |
| v. | : | Case No. 20100264-CA |
| SHERRI LEE TATTON, | : | |
| Defendant and Appellant. | : | |

# BRIEF OF PLAINTIFF AND APPELLEE

APPEAL FROM A CONVICTION FOR DISORDERLY CONDUCT, A CLASS C MISDEMEANOR VIOLATION OF UTAH CODE ANN. § 76-9-102, IN THE SECOND JUDICIAL COURT, STATE OF UTAH, DAVIS COUNTY, LAYTON DEPARTMENT.

THE HONORABLE MARK DECARIA, PRESIDING
District Court Case # 091600497

Clinton R. Drake (11155)
Layton City Attorney's Office
437 North Wasatch Drive
Layton, Utah 84041
Attorney for Plaintiff/Appellee

Jeremy M. Delicino
10 West Broadway, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 364-6474
Attorney for Defendant/ Appellant

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Attorney for Defendant/ Appellant

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**CONSTITUTION, STATUTES AND RULES**

## JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a conviction of Disorderly Conduct, a class C misdemeanor violation of UTAH CODE ANN. § 76-9-102, in the Second Judicial District Court, Davis County, the Honorable Mark DeCaria, presiding. This Court has jurisdiction over the appeal under UTAH CODE ANN. § 78A-4-103(2)(e)(2010).

## ISSUES ON APPEAL AND STANDARDS OF REVIEW

Plaintiff/appellee is in agreement with the defendant/appellant's statement of the issues on appeal and standards of review, as outlined in the Brief of Appellant.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

**UTAH CONST. art. 1, § 1**

> All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

**UTAH CODE ANN. § 41-6a-102. Motor Vehicles - Traffic Code – Definitions.**

> (42) "Pedestrian" means a person traveling: (a) on foot; or (b) in a wheelchair.
>
> (44) "Person" means every natural person, firm, copartnership, association, or corporation.
>
> (62) "Traffic" means pedestrians, ridden or herded animals, vehicles, and other conveyances either singly or together while using any highway for the purpose of travel.
>
> (72) "Vehicle" means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except devices used exclusively on stationary rails or tracks.

**UTAH CODE ANN. § 41-6a-308 Lane use control signals**

The operator of a vehicle facing a traffic-control signal placed to control individual lane use shall obey the signal as follows:

(1) Green signal -- vehicular traffic may travel in any lane over which a green signal is shown.

(2) Steady yellow signal - - vehicular traffic is warned that lane control change is being made.

(3) Steady red signal - - vehicular traffic may not enter or travel in any lane over which a red signal is shown.

(4) Flashing yellow signal - - vehicular traffic may use the lane only for the purpose of approaching and making a left turn.

**UTAH CODE ANN. § 41-6a-906 Designation of through highways**

A highway authority, with reference to highways under its jurisdiction, may erect and maintain stop signs, yield signs, or other traffic-control devices to designate:

(1) through highways; or

(2) intersections or other roadway junctions at which vehicular traffic on one or more of the roadways should yield or stop and yield before entering the intersection or junction

**UTAH CODE ANN. § 53A-3-504(1) Traffic ordinances on school property**

(1) A local political subdivision in which real property is located that belongs to, or is controlled by, the State Board of Education, a local board of education, an area vocational center, or the Schools for the Deaf and the Blind may, at the request of the responsible board of education or institutional council, adopt ordinances for the control of vehicular traffic on that property.

**UTAH CODE ANN. § 76-2-406. Force in defense of property**

(1) A person is justified in using force, other than deadly force, against another when and to the extent that the person reasonably believes that force is necessary to prevent or terminate another person's criminal interference with real property or personal property:

(a) Lawfully in the person's possession;

(b) Lawfully in the possession of a member of the person's

immediate family; or

(c) Belonging to a person whose property the person has a legal duty to protect.

(2) In determining reasonableness under Subsection (1), the trier of fact shall, in addition to any other factors, consider the following factors:

(a) The apparent or perceived extent of the damage to the property;

(b) Property damage previously caused by the other person;

(c) Threats of personal injury or damage to property that have been made previously by the other person; and

(d) Any patterns of abuse or violence between the person and the other person.

**UTAH CODE ANN. § 76-9-102. Disorderly Conduct**

(1) A person is guilty of disorderly conduct, if:

(a) he refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or

(b) intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he:

(i) engages in fighting or in violent, tumultuous, or threatening behavior;

(ii) makes unreasonable noises in a public place;

(iii) makes unreasonable noises in a private place which can be heard in a public place; or

(iv) obstructs vehicular or pedestrian traffic.

## STATEMENT OF THE CASE

**Charge.** Defendant was charged by Information with one count of Disorderly Conduct, a class C misdemeanor, in violation of UTAH CODE ANN. § 76-9-102, and one count of Criminal Trespass, a class B misdemeanor, in violation of UTAH CODE ANN. § 76-6-206(2)(a). R. 9. Subsequently, an amended information was filed to amend the Disorderly Conduct count to specifically allege violations of the subsections

prohibiting unreasonable noises in a public place and obstruction of vehicular or pedestrian traffic. R. 16.

**Conviction.** Following a jury trial that lasted approximately six hours, Defendant was found guilty of Disorderly Conduct and acquitted of Criminal Trespass. R. 73.

**Sentence.** Defendant waived the right to be sentenced at a later date. Accordingly, the court sentenced Defendant to: serve 90 days in the Davis County Jail with 90 days suspended, successfully complete 12 months on informal court probation with no further violations of law, pay a $200 fine, and complete an anger management class. R. 73.

**Timely Appeal.** Defendant filed a timely notice of appeal.

## STATEMENT OF THE FACTS

It is well established appellate practice that a brief should recite the facts in the light most favorable to the verdict of the trial court. *See State v. Pinder*, 2005 UT 15 ¶ 2. 114 P.3d 551.

On May 22, 2009, Haley Bruce was trying to find the Salt City Pizza Company on Gentile Street, in Layton. R. 87 at 51. After driving past the area where she believed the business to be located, she pulled her car into a parking lot and parked. *Id.* at 51-52. The parking lot belonged to the Costume Castle and had no trespassing signs posted in various locations. *Id.* at 25. Ms. Bruce got out of her vehicle, still

looking for the pizza place, and began to walk east and then west along the block before finally finding, and entering the pizza place. *Id.* at 52.

While Ms. Bruce was paying for her pizza, Defendant swung the Salt City Pizza door open and started yelling profanities at her. *Id.* Defendant had seen Ms. Bruce park in Defendant's private parking lot, and walk over to the Salt City Pizza Company. *Id.* at 95. Ms. Bruce and Defendant did not know each other prior to this incident. *Id.* at 52. Defendant entered the store, upset at Ms. Bruce for parking in the Defendant's parking lot. *Id.* at 37. Salt City Pizza employee, Randall Hunt, testified that Defendant started screaming profanities when she first opened the door and then continued screaming at Ms. Bruce as she entered the building. *Id.* at 38. Mr. Hunt testified that the now frightened Ms. Bruce, was apologizing and backing away from Defendant and bumped into the soda machine. *Id.* at 39. Mr. Hunt told Defendant two or three times to leave. *Id.* When she did not respond to his requests, he finally told her that if she didn't leave he would call the police. *Id.* Only then did Defendant leave the building. *Id.* at 38.

Ms. Bruce quickly finished getting her pizza and proceeded to leave. *Id.* at 54. Outside the pizza place she encountered Defendant again. *Id.* Defendant was filming Ms. Bruce and yelling all sorts of profanities, calling her names and screaming at Ms. Bruce to get off the property. *Id.* Still apologizing, Ms. Bruce hurriedly got into her car, reversed out of the parking spot and attempted to drive

towards an exit/entrance. *Id.* Defendant then stepped in front of the vehicle, preventing Ms. Bruce from exiting the parking lot. *Id.*

The parking lot had two entrances, one on the west side of the parking lot and one on the east side. *Id.* at 22. Ms. Bruce initially entered the parking lot through the east entrance, from Gentile Street. *Id.* Layton City Police Officer Wesley McKinney, described Gentile Street as an extremely busy road with limited visibility. *Id.* at 33-34. For someone to back onto Gentile from that parking area, their vehicle would have to enter the lane of travel before being able to see if it is completely clear. *Id.* at 34-35.

Ms. Bruce was unable to reverse for fear of backing into oncoming traffic and unable to move forward to exit through the west exit/entrance because Defendant was in front of her vehicle. *Id.* at 54. Ms. Bruce felt trapped. *Id.* Ms. Bruce pleaded with Defendant to move so she could return to work. *Id.* at 55. Defendant told Ms. Bruce that neither of them was going anywhere. *Id.* Defendant demanded that Ms. Bruce had to back out of the parking lot the same way she entered, instead of proceeding to the west exit/entrance. *Id.* at 101. Ms. Bruce called the police for assistance. *Id.* at 56. Defendant testified that Ms. Bruce "inched forward" with her car and knocked Defendant down. *Id.* at 101. No other witness provided testimony to support this allegation.

Officer McKinney, responded to the scene. *Id.* at 12. He testified that Defendant was very agitated and yelling about people trespassing on her property.

*Id.* at 20. He also testified that her yelling was in a manner where it was drowning everybody else out and it was fairly difficult to get her to calm down enough to speak with her. *Id.* at 20-22.

Defendant was charged by Information with one count of Disorderly Conduct, a class C misdemeanor, in violation of UTAH CODE ANN. § 76-9-102, and one count of Criminal Trespass, a class B misdemeanor, in violation of UTAH CODE ANN. § 76-6-206(2)(a). R. 9. Subsequently, on March 9, 2009, an amended information was filed to amend the Disorderly Conduct count to specifically allege violations of the subsections prohibiting unreasonable noises in a public place and obstruction of vehicular or pedestrian traffic. R. 16. *See* UTAH CODE ANN. §§ 76-9-102(1)(b)(ii) & (iv). Defendant was found guilty of Disorderly Conduct and acquitted of Criminal Trespass. R. 73.

## SUMMARY OF THE ARGUMENTS

1. The trial court did not err by denying the request to instruct the jury on the meaning of 'traffic' or by denying Defendant's motion for a directed verdict.
2. Defendant's conviction under UTAH CODE ANN. § 76-9-102(1)(b)(iii) was proper because the statute is not unconstitutionally vague or overbroad in its prohibition of unreasonable noises.

3. The trial court properly denied the request to instruct the jury that Defendant had the right to protect her private property where no damage or threat of damage to the property existed.
4. The trial court properly denied the request to instruct the jury that Defendant's intent to cause public inconvenience, annoyance or alarm must have been the predominant intent to be found guilty of disorderly conduct.

## ARGUMENTS

### ARGUMENT I.

THE TRIAL COURT DID NOT ERR BY DENYING THE REQUEST TO INSTRUCT THE JURY ON THE MEANING OF 'TRAFFIC' OR BY DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT.

The trial court's decision to deny the request to instruct the jury on the meaning of 'traffic' was correct. Defendant's use of non-binding authority is unpersuasive as other sections of the Utah Code provide ample instruction on the definition of 'traffic.' Utah's statute provides that a person is guilty of disorderly conduct if intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he obstructs vehicular or pedestrian traffic. *See* UTAH CODE ANN. § 76-9-102(1)(b)(iv). Although Title 76 of the Utah Criminal Code does not define 'traffic,' it is defined within Title 41 of the Motor Vehicle Act to include "vehicles, and other conveyances either *singly* or together." UTAH CODE ANN. § 41-6a-102(62) (emphasis added). Additionally, 'pedestrian' is defined as "a

person" and 'vehicle' is defined as "a device" which both apply to a singular form of the category being referenced. UTAH CODE ANN. §§ 41-6a-102(42) & (72). "The plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters." *State v. MacGuire,* 2004 UT 4, 84 P.3d 1171 (internal quotations and citations omitted).

The definition of 'traffic,' as seen in other statutes under related chapters, is used to encompass both the single vehicle as well as a multiple vehicles. For example, the statute governing lane use control signals found in UTAH CODE ANN. § 41-6a-308, states:

> The operator of a vehicle facing a traffic-control signal placed to control individual lane use shall obey the signal as follows:
> (1) Green signal -- vehicular traffic may travel in any lane over which a green signal is shown.
> (2) Steady yellow signal - - vehicular traffic is warned that lane control change is being made.
> (3) Steady red signal - - vehicular traffic may not enter or travel in any lane over which a red signal is shown.
> (4) Flashing yellow signal - - vehicular traffic may use the lane only for the purpose of approaching and making a left turn.

The application of 'vehicular traffic' in this statute is clearly applicable to a single vehicle encountering the traffic light, as well as multiple vehicles. In addition, the statute governing traffic control devices, found in UTAH CODE ANN. § 41-6a-906(2) states:

> A highway authority, with reference to highways under its jurisdiction, may erect and maintain stop signs, yield signs, or other traffic-control devices to designate:

> (1) through highways; or
> (2) intersections or other roadway junctions at which vehicular traffic on one or more of the roadways should yield or stop and yield before entering the intersection or junction.

Again, this statute is clearly applicable whether a single vehicle or multiple vehicles must make the stop or yield as required by the sign.

Title 41 is not the only place where 'traffic' is used generally and applicable to a single vehicle. Similar to Title 76, the State System of Public Education section of the Utah Code does not define 'traffic,' within the title. However, in UTAH CODE ANN. § 53A-3-504(1), it provides that:

> "(1) A local political subdivision in which real property is located that belongs to, or is controlled by, the State Board of Education,... may, at the request of the responsible board of education or institutional council, adopt ordinances for the control of vehicular traffic on that property."

The application of this statute, again, clearly applies to a single vehicle violating the adopted ordinance as much as it would multiple vehicles.

Defendant supports her argument, that 'traffic' involves more than interference with a single vehicle, with citations from *State v. Anonymous*, 363 A.2d 772 (Conn. C. P. 1976) and *Seymour v. Seymour*, 289 N.Y.S.2d 515 (N.Y. Fam. Ct. 1968). The cases are not Utah cases; rather they are from Connecticut and New York and are not binding authorities. Where the Utah Code contains definitions and application of the term 'traffic' throughout the Code, those definitions should likewise be applicable in this case.

Furthermore, the totality of the circumstances in the *Anonymous* and *Seymour* cases are distinguishable with the facts of the current case, In the *Anonymous* case, the court held that a violation of the disorderly conduct statute had not occurred when the defendant prevented the complainant from exiting his vehicle. 363 A.2d 772 at 98. The defendant approached the complainant to sell a newspaper and solicit support for a radical political party. *Id.* at 94. Even after the complainant declined, the defendant persisted in his solicitation. *Id.* Ultimately bothered by the communist inferences contained in the paper being sold, the complainant reported the conduct to the police. *Id.* at 96. Nonetheless, "[t]he complainant had rolled down his window," "persisted in trading comments with the defendant," and failed to signal, at any time, that the conversation had ended." *Id.* at 97.

In the current case, Defendant's approach to Ms. Bruce consisted of yelling and profanities, rather than a persistent solicitation of support. R. 87 at 53. In response, Ms. Bruce repeatedly apologized, got into her car and tried to leave until Defendant stopped her by standing in front of her vehicle. *Id.* at 54. Defendant was not merely expressing an unpopular opinion for which her right to free speech protected her. Instead, she continuously engaged in yelling at Ms. Bruce and prevented her from driving out of the parking lot despite her efforts to do so, quickly and safely. *Id.*

In the *Seymour* case, the defendant was the complainant's estranged husband and the matter came before the New York Family Court which had jurisdiction over

acts between spouses or other members of the same family. 289 N.Y.S.2d 515 at 517. The court noted that where the intent and purpose of the disorderly conduct statute seemed to apply to "public situations where the public peace and decorum are threatened," the case before the court involved allegations "of a private nature, that of the respondent directing his hostile conduct towards the petitioner and her children." *Id.* at 518. The court further distinguished the allegation of disorderly conduct from the statute by defining a "type of conduct" relating to "highways or thoroughfares for extended periods of time." *Id.*

Although the definition created in support of the New York court's holding in this case is helpful to illustrate its reasoning for the holding in the *Seymour* case, Appellee would argue that such a broad and dramatic black letter definition was not necessarily the court's intent. If it were to be imposed on all future interpretations of the statute, it would, among other circumstances, exclude application of the statute to a public incident, between strangers, that interrupted traffic on a smaller road for only a brief period of time. Logically, in reading the plain language of the statute, this hypothetical should not be summarily dismissed under the proposed definition.

Additionally, and in contrast to the *Seymour* case, Defendant was not related to Ms. Bruce, did not know Ms. Bruce and was not involved in domestic litigation with Ms. Bruce. R. 87 at 52-3. Indeed, the altercation between them was not a private matter in any way, as was the case in *Seymour*. Instead, it occurred between

complete strangers, in a business open to the public and could have involved any member of the public, not limited specifically to Ms. Bruce.

"Doubt [should not be injected] as to the meaning of words where no doubt would be felt by the normal reader." *State v. MacGuire*, 2004 UT 4, ¶18, 84 P.3d 1171. Rather, "[i]n considering the meaning of a [statutory] provision, ... [w]e need not look beyond the plain language unless we find some ambiguity in it." *Id.* at ¶15 (citation omitted). Moreover, "[t]he plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters." *Id.* (citation omitted).

The plain language and definitions contained in UTAH CODE ANN. § 41-61-102(62) provides sufficient meaning to the term 'traffic' and includes a single vehicle as defined therein. A defendant is not entitled to a jury instruction which "does not comport with the facts presented or does not accurately state the *applicable* law." *Salt Lake City v. Smoot*, 921 P.2d 1003, 1008 (Utah Ct. App. 1996) (emphasis added). Accordingly, the trial court properly denied the request to issue an additional jury instruction based on the interpretations of non-binding authority and properly denied Defendant's motion for a directed verdict.

## ARGUMENT II.

DEFENDANT'S CONVICTION UNDER UTAH CODE ANN. § 76-9-102(1)(b)(iii) WAS PROPER BECAUSE THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD IN ITS PROHIBITION OF UNREASONABLE NOISES.

Defendant's argument that the disorderly conduct statute is unconstitutionally vague or overbroad in its prohibition of unreasonable noises is without merit as it is based upon language in case law that has since been eliminated from the Utah Code. "A statute is presumed constitutional, and we resolve any reasonable doubts in favor of constitutionality." *State v. Norris*, 2007 UT 6, ¶ 10, 152 P.3d 293. A law is "unconstitutional if it is so vague that men of common intelligence must necessarily guess at its meaning." *In re Boyer*, 636 P.2d 1085, 1088 (Utah 1981). Those challenging the constitutionality of a statute "bear a heavy burden of demonstrating its unconstitutionality." *State v. MacGuire*, 2004 UT 4, ¶8, 84 P.3d 1171. Moreover, legislative enactments are presumed valid and the courts "will not strike down a legislative act unless that act is clearly in conflict with the higher law as set forth in the Constitution." *State v. Murphy*, 674 P.2d 1220, 1222 (Utah 1983).

*Logan City v. Huber* came before the Court of Appeals of Utah in 1990, wherein 'obscene' or 'abusive' language in a municipal ordinance was struck down. 786 P.2d 1372 (Utah Ct. App. 1990). In *Huber*, the defendant was charged with disorderly conduct pursuant to the city ordinance prohibiting "abusive or obscene language ... in a public place." *Id.* at 1374. Huber engaged in shouting vulgarities at police officers during a traffic stop. *Id.* at 1373. The ordinance was held to be unconstitutionally overbroad on its face, because it criminalized speech. *Id.* at 1374. Defendant bases their argument on this holding and applies it to the current

disorderly conduct statute. Br. Aplt at 13. However, the language referenced in *Huber* was eliminated from the statute in 1999.

During the 1999 General Session of the Legislature of the state of Utah, House Bill 217 was introduced and ultimately enrolled as the current disorderly conduct statute.[1] Aside from minor formatting changes, the only amendment to the statue was the elimination of what was formerly subsection (iv), which preceded the current subsection (iv). The eliminated subsection provided that, in addition to the statutory provisions of the current statute, anyone who "engages in abusive or obscene language or makes obscene gestures in a public place" would be guilty of disorderly conduct. *Id.* The amendment was made "in compliance with a Utah Supreme Court ruling." *Id.* The 'unreasonable noise' provisions of the statute previously in place during the 1999 General Session, remain in place today. *See* UTAH CODE ANN. §§ 76-9-102(1)(b)(ii) & (iii).

In the current case, the disorderly conduct provision does not seek to criminalize protected speech; rather it seeks to criminalize "unreasonable noises in a public place." *See* UTAH CODE ANN. § 76-9-102 (1)(b)(iv). Defendant was charged under this provision for her conduct that began in the Salt City Pizza Company, continued outside and ended up in a parking lot. R. 87 at 72 & 53-54. Although, as testimony revealed, Defendant did use profane language when confronting Ms. Bruce, the 'unreasonable noises' consisted of Defendant "yelling" as described by

[1] *Available at* http://le.utah.gov/~1999/htmdoc/hbillhtm/HB0217.htm

Ms. Bruce while inside the pizza business. *Id.* at 53. It also included "screaming" in a "full-on scream...using her best scream voice, top of her lungs" as testified to by Mr. Hunt. *Id.* at 39. Even after Mr. Hunt told Defendant to leave the pizza business two or three times, she continued to scream at Ms. Bruce. *Id.* at 38. It was only after Mr. Hunt told Defendant he was going to call the police, that she finally left. *Id.*

Furthermore, Defendant initiated the altercation, and persisted to engage in unreasonable behavior. *Id.* This was not a two-way confrontation as occurred in *Huber* where police initiated the contact, Huber responded with yelling profanities, and police persisted in their contact to achieve the goal of their investigation. 786 P.2d 1372, 1372-74 (Utah Ct. App. 1990), *see also City of Houston v. Hill,* 482 U.S. 451, 461 (1987)(stating that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers"). Rather, Defendant confronted Ms. Bruce, a complete stranger to Defendant, R. 87 at 52, and a random citizen who parked in Defendant's parking lot, *Id.* at 95. She then subjected both Ms. Bruce, as well as Mr. Hunt, who was working at the time, to her screaming. R. 87 at 38.

The jury found that Defendant's conduct, of screaming in a public place, constituted unreasonable noise. *Id.* at 138. As stated by the prosecution during closing arguments, "[w]hat's peaceful and dignified at a boxing match and on a football field is very different from what's peaceful and dignified in a restaurant." R. 87 at 136. Even though reasonableness may depend on the circumstances, "a man

of common intelligence," *In re Boyer*, 636 P.2d 1085, 1088 (Utah 1981), does not have to guess at the meaning of 'reasonable' as applied to the facts of this case.

The term reasonable is used virtually on an everyday basis and is commonly understood, as related to its use. It is a fundamental part of our criminal justice system and 'proof beyond a reasonable doubt' is the standard of proof required in a criminal case. Accordingly, the conviction under UTAH CODE ANN. § 76-9-102(1)(b)(iii) was proper because the statute is not unconstitutionally vague or overbroad in its prohibition of unreasonable noises.

**ARGUMENT III.**

THE TRIAL COURT PROPERLY DENIED THE REQUEST TO INSTRUCT THE JURY THAT DEFENDANT HAD THE RIGHT TO PROTECT HER PRIVATE PROPERTY WHERE NO DAMAGE OR THREAT OF DAMAGE TO THE PROPERTY EXISTED.

Defendant argues that she had the right to protect her private property. However, her actions are not consistent with Utah law, which enumerates very distinct parameters for which a Defendant can justify the exercising of that right. "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property;...." UTAH CONST. art. I, § 1. In accordance with that right, UTAH CODE ANN. § 76-2-406(1) provides:

> (1) A person is justified in using force, other than deadly force, against another when and to the extent that the person reasonably believes that force is necessary to prevent or terminate another person's criminal interference with real property or personal property:
> (a) Lawfully in the person's possession;
> (b) Lawfully in the possession of a member of the person's immediate family; or

> (c) Belonging to a person whose property the person has a legal duty to protect.

However, the right to use force is tempered by a person's reasonable belief that force is necessary. Accordingly, the Utah legislature provided a basis for determining the reasonableness of using force. UTAH CODE ANN. § 76-2-406(2) provides:

> (2) In determining reasonableness under Subsection (1), the trier of fact shall, in addition to any other factors, consider the following factors:
> (a) The apparent or perceived extent of the damage to the property;
> (b) Property damage previously caused by the other person;
> (c) Threats of personal injury or damage to property that have been made previously by the other person; and
> (d) Any patterns of abuse or violence between the person and the other person.

Defendant asserts her right to use force in protecting her property and attempts to extend that right to include a verbal assault. However, Defendant fails to acknowledge the statutory parameters set that must be met to justify the right to use force.

In order for Defendant to reasonably believe force is necessary, the court must find that either there was "apparent or perceived damage to the property," or that previous damage had occurred, threats of injury or damage had been made, or previous patterns of abuse or violence existed between the persons involving the property at issue. *See* UTAH CODE ANN. § 76-2-406(2). None of these conditions existed to support the exercise of this defense by Defendant or to justify a jury

instruction to that effect. Indeed, Defendant's testimony did not allege any damage to the property, tangible or otherwise. There was no testimony that the parking lot was full or that Ms. Bruce was taking a spot away from a paying customer. There was no testimony that Ms. Bruce inflicted any physical damage to the property. And no testimony that Defendant had any reason to believe that damage would occur. Furthermore, Defendant's and Ms. Bruce's testimony wholly lacked any facts to infer that they had met before, thus eliminating the possibility that previous damage had been inflicted by Ms. Bruce or that she'd been engaged in a pattern of abuse, violence or threats towards Defendant.

Ms. Bruce's efforts to leave the property by driving forward to the west exit/entrance would have sufficiently ended any perceived interference with the use of Defendant's property. R. 87 at 54-55. Instead, Defendant, herself, invited a continued interference by following Ms. Bruce to her car and then standing in front of the vehicle in an effort to force Ms. Bruce to back out of the parking lot onto a busy road. *Id.* Defendant asserts through introduction into evidence of a picture, that Gentile is not a busy road. R. 87 at 99. The lack of traffic at the moment the picture was taken is not indicative of traffic or the potential hazard in backing out onto the road. Indeed, there are countless moments when a picture of Interstate 15 or any other highway could be taken evidencing no traffic, however, that does not sufficiently create a basis to state that the highway is not a busy road or that it would be prudent to back a vehicle onto it. As Officer McKinney testified, Gentile

Street is an "extremely busy" road with "limited visibility," *Id.* at 34, and therefore, it was not unreasonable for Ms. Bruce to conclude that exiting from the west was a safer course of action. *Id.* at 54. Had the facts of this case included a grassy area or a field of wheat, then logically not only would Ms. Bruce's presence have already caused damage, but for her to drive further on the property would have increased the damage. But the facts of this case merely involve a paved parking area where no damage had occurred and no additional damage would have occurred if Defendant had permitted Ms. Bruce to quickly leave as Defendant had initially demanded.

Accordingly, based on the parameters set by the Utah Code establishing the basis for a reasonable belief that force is necessary, Defendant was not entitled to application of this statute as a defense and the trial court did not err in denying the request for a jury instruction.

## ARGUMENT IV.

THE TRIAL COURT PROPERLY DENIED THE REQUEST TO INSTRUCT THE JURY THAT DEFENDANT'S INTENT TO CAUSE PUBLIC INCONVENIENCE, ANNOYANCE OR ALARM MUST HAVE BEEN THE PREDOMINANT INTENT TO BE FOUND GUILTY OF DISORDERLY CONDUCT.

Defendant argued that prosecution must prove that her intent to cause public inconvenience, annoyance or alarm must have been the predominant intent for her actions to support a conviction of disorderly conduct. The judge correctly decided that the jury instructions presented at trial sufficiently address the intent element of the statute. A defendant is "entitled to have his theory of the case presented to the jury in a clear and understandable way." *Salt Lake City v. Smoot*, 921 P.2d 1003,

1008 (Utah Ct. App. 1996). However, that does not entitle a defendant to a jury instruction which "does not comport with the facts presented or does not accurately state the applicable law." *Id.* Additionally, a trial court may properly refuse "a proposed instruction if the point is properly covered in the other instructions." *State v. Alonzo,* 932 P.2d 606, 615 (Utah Ct. App. 1997).

Defendant did not request an instruction based on Utah law, rather Defendant's proffered instruction relied on a Connecticut court's interpretation of a similar statute. R. 87 at 83. Specifically, Defendant requested that the specific intent of the statute be defined as the predominant intent of her actions. *Id.* To allow a jury instruction based on non-binding authority is to invite any interpretation of law from any jurisdiction into the courtroom as the basis to convict or acquit. Such a proposition is chaotic in its application and undermines the legislative and judicial powers to determine the laws of this state and enforce them, respectively.

Utah's disorderly conduct statute's provision that, "(1) A person is guilty of disorderly conduct if ... (b) intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, ..." plainly establishes that a defendant must *intend* to cause the elements or *recklessly* create a risk thereof. UTAH CODE ANN. § 76-9-102(1)(b) (emphasis added). Jury Instructions numbered 28 and 29 set out the plain language of the statute under which Defendant was charged. R. 22 at No. 28-29. Subsequently, in jury instruction number 32, the trial court set out the definition of a number of terms, for purposes of assisting jurors in their

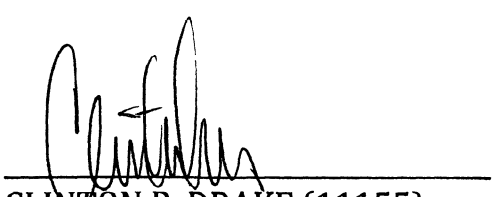
understanding and deliberation of the elements. R. 22 at No. 32. Inclusive in the definitions provided was the definition of 'intentionally' and 'recklessly.' *Id.* The combination of the statutory language and definitions, sufficiently justified the trial court's ruling that "the statute and the language in the jury instructions [spoke] for itself." R. 87 at 85. Furthermore, the court properly noted that it was "not going to allow Connecticut to make law in Utah." *Id.*

Defendant had ample opportunity to present her defense theory through opening statements, her own testimony, cross-examination of prosecution witnesses and closing arguments. The trial court's refusal to instruct the jury on a proffered request based on non-binding authority has neither infringed on Defendant's constitutional rights nor prejudiced the outcome of the case. Accordingly, the trial court's denial of the proffered jury instruction was proper.

## CONCLUSION

For the reasons more fully set forth above, Plaintiff and Appellee respectfully requests that this Court uphold the rulings of the trial court and affirm the conviction of Defendant.

Respectfully submitted,



CLINTON R. DRAKE (11155)
COUNSEL FOR PLAINTIFF AND APPELLEE